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ABSTRACT

This report discusses the constitutionality of state aid to church-related institutions of higher education. The introduction deals with the important role that private institutions play in the total system of higher education, the seriousness of their financial plight, and the necessity for increased state aid to these institutions. Sections 2 and 3 respectively deal with the position of the Federal Constitution and the Texas Constitution on federal and state aid to church-supported institutions. The next 2 sections deal with the constitutionality of state aid to church-supported institutions in terms of student support and institutional support. The conclusion is reached that on both the federal and state constitutional level, the federal and state governments may, without committing constitutional error, give some support to church-related colleges and universities either by way of incidental or indirect benefits or by subsidizing aspects of education and the educational process of a secular nature. (AF)

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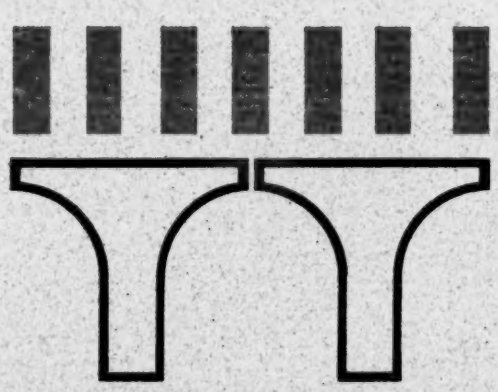

PRIVATE HIGHER EDUCATION AND THE CONSTITUTIONS

Constitutionality of State Aid to Private Higher Education

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PRIVATE HIGHER EDUCATION
AND
THE CONSTITUTIONS

Constitutionality of State Aid to Private Higher Education

"A Study of Private Higher Education in Texas and Its Planned Contribution to the State System"
by the
Liaison Committee on Texas Private Colleges and Universities
of the
Coordinating Board, Texas College and University System

Liaison Committee on Texas Private Colleges and Universities

SUITE 503/COMMODORE PERRY HOTEL/AUSTIN, TEXAS 78701/PHONE 512—476-6751

"A Study of Private Higher Education in Texas and its Planned Contribution to the State System"

January 20, 1969

Mr. John E. Gray, Chairman
Coordinating Board, Texas College
and University System
Sam Houston State Office Building
Austin, Texas 78701

Attention: Dr. Bevington A. Reed, Commissioner of Higher Education

Dear Sirs:

The Liaison Committee on Texas Private Colleges and Universities has already transmitted to you Pluralism and Partnership: The Case for the Dual System of Higher Education and Private Education in Profile. We now have the pleasure to present to you the third and final major report regarding our study of private higher education in Texas, Private Higher Education and the Constitutions.

We asked A. J. Thomas, Jr. and Ann Van Wynen Thomas, professors at the Southern Methodist University School of Law, to consult with the Liaison Committee and to prepare a legal study of the constitutional questions regarding the State's relationship to independent and church-related institutions. Professors Thomas consulted with the Committee and later prepared a memorandum which served as the basis of the Committee's Chapter V of Pluralism and Partnership on Legal Considerations. They were asked to prepare a more definitive document on these legal and constitutional issues, which is this report. We are pleased to present it to the Coordinating Board as a part of the Liaison Committee's study and report.

Again, may we express our appreciation for the concern and attention given the private sector of higher education by the Coordinating Board, and we hope that this study and these reports may be of assistance in facing realistically the public policy issues concerning all of Texas higher education.

Respectfully submitted,

Jno. D. Moseley

Jno. D. Moseley, Chairman

Liaison Committee to the Coordinating Board
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In collaboration with
Independent Colleges and Universities of Texas, Incorporated
The Association of Texas Colleges and Universities
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CONSTITUTIONALITY OF AID BY THE STATE OF TEXAS TO CHURCH-RELATED INSTITUTIONS OF HIGHER EDUCATION

by

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INTRODUCTION

In 1963 the Congress recognized the existence of a crisis in higher education of such proportion as to jeopardize opportunity for the fullest intellectual development of future generations of American youth. This crisis was said to be engendered by the burgeoning and permanent growth in the college-age group of the nation's population which, in turn, would sharply increase college and university enrollment to such a great degree as to render it next to impossible for institutions of higher learning to keep pace with the rate of increase. One educational expert speaking before a congressional committee on the subject emphasized that

> . . . between now and 1980, to accommodate these students, we would need to double the size of every existing institution of higher learning and establish a thousand new institutions with an average enrollment of 2,500 students.[1]

Commissioner of Education Francis Keppel underscoring the crucial nature of the situation stated:

> Between 1950 and 1960 the population 18 to 21 increased 358,000 or 4 percent. Between 1960 and 1970 it is expected to increase 5,216,000 or 56.6 percent.
>
> Enrollment in the colleges and universities increased more than 50 percent in the decade between 1950 and 1960. It is expected almost to double in the present decade and to approach 7 million by 1970. This requires an expansion of physical plant costing roughly 2.3 billion a year; we are now spending only 1.3 billion annually for plant expansion.[2]

Realizing that the traditional sources of financial support, such as private gifts and grants and in the case of public colleges and universities aid from state and local governmental sources, including payment of tuition by students, could not provide for the necessary expansion of higher education. the Congress, to aid in meeting the urgency of the situation, enacted the Higher Education Facilities Act of 1963. This act authorized the disbursement of federal funds in the forms of grants and loans to institutions of higher learning to be used for certain additional academic facilities. These monies were made available to public and also to private institutions including those of a denominational as well as a non-denominational character.[3] Since the passage of this initial act, increased aid has been voted for various purposes.[4]

With the doubling of college enrollment in the last decade and with the even greater than double expansion predicted to take place in Texas between the years 1968 and 1985,[5] it is evident that there is a desperate and imperative need to expand all existing colleges and universities and for the establishment of additional institutions to meet these pressing educational demands. If the aspirations of American youth for higher education are to be met, private colleges and universities, along with public institutions, are indispensable. The need for the private institutions becomes obvious when consideration is taken of the fact that out of a total of 2,252 institutions of higher education in the United States as of 1967, 1,446 were nonpublic,[6] attending to the needs of 35% of the college population.[7] Moreover, 910 of the private institutions have religious affiliations.[8] As of 1968 in the State of Texas, institutions of higher education and their branches numbered slightly over 100, approximately half of these being private and over forty of these having connections with religious organizations. These private Texas institutions of higher learning have a student enrollment of approximately 70,000, with the private religiously-affiliated institutions making up over 58,000 of that total. At present the total state enrollment of college and university students stands at some 372,700, but it is estimated that by 1985 enrollments will increase in all Texas educational institutions of higher learning to 824,900, 118,400 being in the private sector.[9]

Despite the need for the continued existence and

[1] Statement of Dr. Logan Wilson, President of the American Council on Education, Hearings on S. 8, S. 580, S. Res. 70 and others Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess., Vol. I, at 1051 (1963).

[2] As quoted in U.S. Code Congressional and Administrative News, 88th Cong., 1st Sess. 1175 (1963).

[3] 77 Stat. 363, 20 U.S.C. Secs. 701–57 (1964).

[4] Higher Education Act of 1965, 79 Stat. 1219 (1965), as contained in I U.S. Code Congressional and Administrative News, 89th Cong., 1st Sess. 1230 (1965); as amending Higher Education Act of 1963, 20 U.S.C. Secs. 711 *et seq.* (Supp. II, 1965–1966).

[5] *See, e.g.*, Liaison Committee on Texas Private Colleges and Universities, Pluralism and Partnership: The Case for the Dual System of Higher Education [hereinafter cited as Liaison Committee] 5–9, 35 (1968); statement of Policy of the Higher Education Facilities Act of 1963, 77 Stat. 363, 20 U.S.C. Sec. 701 (1964), and statements quoted in U.S. Code Congressional and Administrative News, *supra* note 2, at 1175.

[6] U.S. Dept. of Health, Education and Welfare, Education Directory, Higher Education, pt. 3 at 11 (1966–1967).

[7] U.S. Dept. of Health, Education and Welfare Bull. No. 4, Digest of Educational Statistics 79 (1965).

[8] Education Directory, 1966–1967, *supra* note 6, at 13.

[9] Liaison Committee, 23, 27, 35; and *see* Education Directory 1966–1967, *supra* note 6, at 198 *et seq.*, and Texas Almanac, 1968–1969, 496–98 for enrollment figures in Texas colleges and universities.

expansion of private colleges so as to augment enrollment capacity to permit handling of the future expected demand, the budgetary problems of many of such private institutions have become so acute as to prevent the requisite expansion. Indeed, the very maintenance, to say nothing of improvement of academic standards, in some private institutions has become endangered. Rising costs of construction, of facility maintenance, of salaries for academic and for other personnel have created a financial bind which cannot be met by student tuition and private philanthropy.[10] As of 1965 federal funds constituted 26.5 percent of the current fund income of private colleges,[11] and federal aid has increased since then as additional federal programs have been inaugurated. Notwithstanding this increased federal aid, the financial problems of private institutions have worsened with the burdens of the growth in enrollments and spiralling costs. Since state funds to private institutions have been negligible, contributing only about 1.3 percent of current fund income of private higher educational institutions,[12] it would seem that drastic increases must come from this final source of additional revenue if private, including religiously affiliated, colleges and universities are to be saved or to continue with the finest of academic standards.

The states could in the future, as they have largely done in the past, confine the expenditure of state monies to public institutions—to the expansion of established institutions and to the creation of new ones. This would mean an enormous outlay from public funds to cope with the critical situation existing in higher education. State funds for state institutions would have to be used to provide facilities not only for the expected increase in students which would in any event attend the public colleges and universities, but also for the increase of students who would normally attend the private schools, inasmuch as those schools faltering in their educational programs because of lack of funds, could hardly, with their spiralling tuition costs, be expected to continue to attract students. Moreover, some private institutions might have to close their doors altogether. Those students who did continue at private institutions would, in many cases, again because of lack of funds, receive deficient and inferior education. The existing facilities of private schools would be wasted while the state spends large sums to duplicate them. This would appear to be an uneconomic use of resources. Finally, it is doubtful whether the public colleges can be expanded in sufficient time to meet the influx in the next few years of expected students. This delay in meeting the demand for expanded facilities would result in additional overcrowding in public institutions which, in turn, would make for poor quality education.[13]

Although it seems clear that all available educational facilities must be maintained and expanded and that federal and state funds are needed, political and possible legal obstacles to such governmental aid are present in the case of colleges and universities with religious connections. The possible legal obstacle is constitutional in nature and involves both the Federal Constitution and that of many of the states, including the Constitution of the State of Texas.

[10] *See* Hearings on S. 8, S. 580, S. Res. 10 and others Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess., vol. VI, at 3617–3621; Liaison Committee, Chs. II and IV.

[11] U.S. Dept. of Health, Education and Welfare Bull. No. 4, Digest of Educational Statistics 97 (1965).

[12] *Id.*

[13] *See* Liaison Committee Ch. II entitled "Value of the Existence of the Independent Sector"; and *see* Comment, "Establishment Clause—Grants to Sectarian Colleges for Secular Purposes Held Unconstitutional," 41 N.Y.U. L. Rev. 982 at 987 (1966).

The First Amendment of the Constitution of the United States provides, among other things, that "the Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These are known as the "establishment clause" and the "free exercise" clause respectively and are applicable by the explicit terms of the First Amendment only to the Congress of the United States.[14] However, the Supreme Court of the United States has incorporated them within the meaning of the word "liberty" of the due process of laws clause of the Fourteenth Amendment,[15] which prohibits the states of the union from depriving "any person of life, liberty, or property, without due process of law. . . ." Since the State of Texas is bound by the Fourteenth Amendment and, through this amendment, to the no-establishment principle under the Federal Constitution, any consideration of governmental aid to religiously-affiliated institutions of higher learning must begin with a consideration of the constitutional decisions relating to the constitutional problems involved in separation of church and state, particularly those of the Supreme Court of the United States.

At the outset it should be noted that there is no Supreme Court opinion directly on point on the question of federal or state aid to denominational colleges and universities. However, there are a few decisions relating to aid to parochial schools on an elementary and secondary level. One of the most noteworthy is the case of *Everson v. Board of Education*[16] wherein Justice Black set forth famous words as to the meaning of the establishment clause which included language to the effect that a tax cannot be levied to support religious institutions or activities "whatever they may be called, or whatever form they may adopt to teach or practice religion."[17] From a quick reading of these words one might well conclude that governmental aid to church-related educational institutions would be an impossibility. However, after setting forth this broad statement, Justice Black went on to uphold an authorization for the reimbursement of parents of Catholic school children for transportation to and from parochial schools from public monies as provided by a state statute sanctioning rules and contracts by local school districts for the transportation of children to and from schools. Justice Black came to the conclusion that a public purpose or need would be served by this aid to parochial school children and went on to say that although the statute approached the verge of constitutional limits, it could be sustained as public welfare legislation designed for the safety and benefit of school-aged children. Although Justice Black admitted that more children might be able to go to a parochial school because of this aid, his main emphasis was directed to the fact that here the parochial schools themselves were not receiving the governmental funds.

The *Everson* case indicates that the Constitution does not forbid indirect or incidental aid to a parochial school. If the recipient of the aid is not the religious institution—here it was the parent of the child—and if the purpose is secular—here it was the provision of safe transportation to and from schools—then the aid is constitutional even though it may indirectly aid religion.

This was brought out in an earlier case, *Cochran v. Louisiana State Board of Education*[18] concerning a Louisiana law which permitted textbooks purchased with tax funds to be supplied to all school children, including children in parochial schools. Actually, no issue of state aid to religion or interpretation of the constitutional no-establishment principle was presented in this case. A taxpayer contended that the use of public funds to provide secular textbooks for private, religious, sectarian and other schools was a taking of public property for a private purpose which was forbidden by the Fourteenth Amendment. The Supreme Court disagreed, holding that such was not a taking of property for a private purpose, stressing the fact that the schools were not the beneficiaries of the appropriation; the beneficiaries were the students and the state. The court declared as per Hughes, C.J.:

> The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them. . . . The school children and the state alone are beneficiaries. . . . The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education; its method comprehensive. Individual interests are aided only as the common interest is safeguarded.[19]

Thus the test from these cases appears to boil down to a consideration as to whether the assistance to religious institutions is merely incidental or is direct. If it is incidental or indirect, it is constitutionally permitted.

[14] Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Petus) 243 (1833).
[15] Everson v. Board of Education, 330 U.S. 1 (1947).
[16] *Id.*
[17] *Id.* at 16.
[18] 281 U.S. 370 (1930).
[19] *Id.* at 375.

The Supreme Court of the United States has again had occasion to concern itself in a most recent decision with the supply of textbooks to parochial schools with state tax funds. In *Board of Education v. Allen*[20] the court had before it a New York statute which required a local board of education to purchase and loan upon individual request textbooks to children in both public and private schools which comply with the state's compulsory education law. Involved in the case was the question as to whether the law was one respecting the establishment of religion or prohibiting the free exercise thereof. The court rejected the latter issue rather summarily by pointing out that one attacking an act on grounds of offending the free exercise clause must show the coercive effect of the act on him in the practice of his religion, and there had been a failure so to do.[21] As to the no-establishment principle, the court concluded, through Justice White, that the textbook provision did no constitutional violence. The court noted that the *Everson* opinion was closely in point to the present problem and discussed its citation in the formulation of a test in the school-prayer and Bible-reading case, *Abington School District v. Schempp*,[22] to distinguish between prohibited and non-state involvements with religion. The court said in that case:

> The test may be stated as follows: what are the purpose and effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education. . . .*[23]

Applying this test the decision was reached, as in *Everson*, that since the legislative purpose was secular, education of youth, and that since the financial benefit was to the parents and children, not to the schools, the statute was constitutional. Attention was called to the fact that the supply of free books to students might mean that more would attend the parochial schools, but this was equally true with respect to the furnishing of free transportation in *Everson* and the latter had been upheld in that case. Stress was laid on the further fact that the books loaned by the state must be approved by the public school authorities and only secular books could receive approval and further that court recognition had been given to the reality of the two goals pursued by parochial schools—one to impart religious education and the other to impart secular education. As to the latter, it was also realized that a significant role had been played and continued to be played by private education "in raising national levels of knowledge, competence, and experience."[25] It was then stated:

> Against this background of judgment and experience, unchallenged in the meager record of this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.

Justice Harlan in a concurring opinion emphasized that government's attitude toward religion must perforce be one of neutrality which requires as set forth in the words of Justice Goldberg concurring in the *Schempp* case that

> government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

Harlan was of the opinion that this neutrality was met when the acts of government were meant to achieve purposes of a non-religious nature within the competence of the state, and where the state was not significantly and directly involved in that which was sectarian as to bring about influences which would divide and inhibit freedom. To him the supply of secular textbooks as provided by New York law to parochial school students did not violate the principle.

Justices Black, Douglas and Fortas dissented. Justice Black's position here might seem surprising when one remembers that he wrote the *Everson* opinion upholding the provision of free transportation to parochial school students. However, he and Justice Douglas stated their views forcefully that there was a difference between the providing of public transportation, school lunches or a public nurse from providing books, inasmuch as there was nothing ideological about the former, but books were the very heart of education including religious education, and that even textbooks meant to be secular could be slanted so as to propagate religious doctrine which would be considered as advancing the cause of religion. Allusion was also made to the fact that, despite the provision of the New York law that the books should be provided to the student by individual request, the State Education Department permitted the request to be made through the private school officials. This would permit the authorities of the parochial school to select the

[20] 392 U.S. 236 (1968). The New York Court of Appeals decision, 20 N.Y. 2d 109, 228 N.E. 2d 791 (1967) is noted in 17 Catholic U. L. Rev. 242 (1967); 36 Fordham L. Rev. 129 (1967); 36 Geo. Wash. L. Rev. 246 (1967); 19 Syracuse L. Rev. 144 (1967).

[21] *Id.* at 248–49.

[22] 374 U.S. 203 (1963).

[23] *Id.* at 222.

[24] 392 U.S. at 248.

[25] *Id.* at 249.

books which, although secular, could still contain many elements of dogma to conform to the school's own particular brand of sectarianism. According to the majority opinion this difficulty would be cured because the law provided that the local public school boards must approve the selection, and one of the grounds for approval was that the text must be of a secular or nonreligious character so as to thwart any selection of the sectarian oriented textbook. Justice Douglas, however, would disagree. He believed that since the initiative of selection rested with the parochial schools, they would request and apply powerful pressures to obtain those advancing their own religious philosophy and, of course, if the public school boards surrendered, the prohibited advancement of religion by the state would ensue with consequent violation of the establishment clause. If the Board resisted, the principle of separation of church and state would still be violated, for it would tend to permit domination and control of religion by the state. Neutrality would not prevail and religion would be inhibited.

The dissent of Justice Fortas does not appear to be as strong in opposition as that of the other two justices. His disapproval rests with the fact that the sectarian authorities of parochial schools were in fact permitted to select the books to be used. This results in a special rather than a general program to make available the same school books to all school children. He states that this special choice accorded

> is the feature of the present statute that make it totally inaccurate to suggest, as the majority does here, that furnishing these specially selected books for use in sectarian schools is like "public division of police and fire protection, sewage facilities, and streets and sidewalks.' These are furnished to all alike. They are not selected on the basis of specification by a religious sect. And patrons of any one sect do not receive services or facilities different from those accorded members of other religious sects or agnostics or even atheists.[26]

It can be seen then that the dissenting opinions stress the fact that sectarian school authorities are permitted to select the books. The majority, on the other hand, assumes that all books, since they must be approved by public school authorities, will be secular, for such will be the only ones approved, indeed the only ones that can be approved under the statute. Therefore, books loaned to parochial students will not be "unsuitable for use in the public schools because of religious content."[27]

The *Allen* case can be equated to the *Everson* and *Cochran* cases and the furnishings of the school books can be predicated on the indirect test, *i.e.*, that only indirect aid was given to the institutions involved, since the benefit went directly to the student as a public welfare or public function measure. In adopting the *Schempp* case test of secular purpose and primary effect neither advancing nor inhibiting religion, the court may be painting with a broader brush so as to legitimize not only indirect aid, but also direct aid to church related colleges and universities, lending support for a view that direct aid for specific secular purposes would be constitutional on the basis that such aid to education can be considered public welfare measure with a definite secular purpose. As indicated previously a pragmatic case for governmental financial assistance based on educational necessities can be made.[28]

Although, as has been stated, there are no extant Supreme Court of the United States decisions bearing upon aid (direct or indirect) to denominational colleges and universities, there is a recent Maryland case, *Horace Mann League of the United States v. Board of Public Works*,[29] which gives an interesting legal viewpoint on the constitutional validity of such aid under the First Amendment of the United States Constitution. Under review were State of Maryland grants to four private denominational colleges to provide for construction of non-religious facilities for dormitories, cafeterias and science buildings. The Maryland court, making use of the *Schempp* case test, evaluated the religious character of the colleges to determine the primary effect of the grant, holding that no direct aid, even though earmarked for secular purposes, could be granted to what it termed a legally sectarian college, *i.e.*, wherein the religious influence permeates the institution or where the college has a distinctly religious flavor. On the other hand, it held that such a grant was permissible to a church related college which did not have any sectarian requirements for faculty or students and was thus not considered sectarian in a legal sense. The criteria to be considered to make the determination as to legal sectarianism was said to include the stated purposes of

[26] *Id.* at 271–72.
[27] *Id.* at 245.

[28] *See* "Introduction," *supra*.
[29] 242 Md. 645, 220, A. 2d 51 (1966), *cert. denied and appeal dismissed*, 385 U.S. 97 (1966). This case has been discussed by the following authorities: P. Kauper, "Religion, Higher Education and the Constitution," 19 Ala. L. Rev. 273 (1967); J. Byrne & J. Koskiren, "The Constitutionality of Federal Aid to Sectarian Universities," 17 Catholic U. L. Rev. 139 (1967); Comments, "Establishment Clause Grants to Sectarian Colleges for Secular Purposes Held Constitutional," 41 N.Y.U. L. Rev. 983 (1966); "Horace Mann League of the United States v. Board of Public Works, 242 Md. 645, 220 A. 2d 51 (1966)—"Public Aid to Sectarian Colleges," 62 Nw. L. Rev. 253 (1967); "The Establishment Clause and Governmental Aid to Colleges," 11 St. Louis L. J. 464 (1967); "Constitutional Law—Establishment of Religion—State Grants to Sectarian Colleges," 52 Iowa L. Rev. 571 (1966).

the college, the college personnel, the college's relationship with religious groups, the place of religion in the college's program, the results of the college's program, the work and image of the college in the community.

The Supreme Court of the United States failed to grant *certiorari*, therefore, we have no decision from that body to indicate the correctness of the reasoning of the Maryland court.

Thus, to determine the constitutionality of aid to church-related institutions of higher learning, attention must be directed to the opinions of the Supreme Court's decisions in other church-state relationship cases particularly those most nearly in point, the textbook and school transportation cases, although involved there were primary and secondary schools, not colleges or universities. But in taking stock of these cases, the Maryland court's opinion in *Horace Mann* does not seem to portray accurately the attitude of the Supreme Court, particularly as that attitude is expressed in the *Allen* case. In that latter case the Supreme Court did not follow the Maryland court in its legal sectarianism distinction. Indeed, it is doubtful if it could do so for parochial schools are for the most part permeated with sectarianism to such an extent that all would probably have to be considered as legally sectarian according to the Maryland criteria so as to bar direct aid. The dissenting justices point out, for example in the *Everson* case, that parents send their children to such religious schools because the instruction is religious and that a commingling of "the religious with the secular teaching does not divest the whole of its religious permeation. . . ."[30] Justice Jackson spoke even more strongly saying "that the parochial school is vital, if not the most vital part of the Roman Catholic Church."[31] Even in the *Allen* case, the majority, although recognizing the aid to be constitutional, still set forth the fact that "religious schools pursue two goals, religious instruction and secular education,"[32] but expresses the opinion that the two are not so interwined that furnishing of secular aid (textbooks) is instrumental in aiding the religious function. Thus the Supreme Court does not seem impressed with a prohibition of aid to those institutions classified as *legally* sectarian. It is permitting certain aid which incidentally aids even those institutions, and the view has been expressed that an even more liberal stance should be adopted as to colleges and universities because religion plays a less conspicuous role in these educations, as contrasted to its role in parochial primary and secondary schools, and because college students, being more mature, are less subject to the influence of religious indoctrination than are primary or secondary students.[33]

Nevertheless, the *Allen* case is a case, like that of *Everson* and *Cochran*, conferring the benefit directly on the student, and the latter two cases in placing emphasis on the fact that the child and not the institution was the recipient might cast doubt on the federal constitutionality of direct grants or aid to church-related colleges and universities. It might be reasoned that the aid is constitutional if given, for example, to the student, rather than to the institution, and, since not given directly to the institution, benefits it only indirectly. The Maryland case builds largely on such reasoning, for it holds in effect that aid can be given directly only to secular institutions. It classifies certain church affiliated institutions as secular and some as legally sectarian and, as to the latter, holds that direct state grants of funds to them even for a secular purpose were constitutionally impermissible as an establishment of religion. Such a narrow view of the direct grants to denominational educational institutions may be erroneous. The Federal Constitution does not necessarily in all instances forbid direct grants to church-related institutions; rather it seems to forbid such grants which directly aid or benefit religion. Under such an approach any direct governmental aid which would benefit the religious function of an institution would be taboo. Thus public monies given to divinity schools where the religious function dominates or to an institution or any of its departments where religion influences the teaching of secular subjects would be forbidden, for such grants would then directly benefit religion, or, in the words of the *Schempp* case, would primarily advance a religious purpose. And, again following the language of that case as accepted in the *Allen* case, it would seem clear that grants to denominational colleges and universities for secular education and secular educational facilities clearly identified as secular in nature would be constitutional. The primary purpose or effect would not be aid to religion even when granted to an institution where the religious influences are strong, for in denominational institutions even as in the parochial schools, the goal of secular education relates to a public function and is not necessarily intertwined with the religious function or goal so as to prohibit public aid to the secular.

Argument has been made, however, that grants for

[30] 330 U.S. at 47.
[31] *Id.* at 24.
[32] 236 U.S. at 245.

[33] Dep't. of Health, Education, and Welfare, "Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education," [hereinafter referred to as Memorandum] 50 Geo. L. J. 351 at 377–81 (1961).

secular educational purposes to denominational institutions should be considered as benefitting religion, inasmuch as grants for non-religious facilities and purposes free funds for religious uses.[34] Nonetheless, such would seem to be an indirect or incidental or secondary benefit only. The principle enunciated in *Schempp* would appear to demand that religion be the *sole* or *primary* beneficiary.

It has also been contended that a statute which furthers secular and religious ends must be examined to determine if the secular end could have reasonably been attained by means that do not further the promotion of religion.[35] The test also seems to be met in view of the facts set forth above *re* the need for expanded higher educational facilities and the feasibility of aiding existing church-related institutions rather than uneconomically to duplicate such facilities by expansions and increases in public institutions at a substantially heavier burden to the taxpayer.

From these precedents, it can be logically concluded that not all aid by government—state or federal—to religiously-affiliated institutions of higher learning is denied by the establishment clause of the United States Constitution.[36]

[34] *See* Concurring Opinion of Justice Douglas in the *Schempp* case, 374 U.S. at 229.

[35] Mr. Justice Frankfurter's separate opinion in *McGowan v. Maryland*, 366 U.S. 459, 465–67 (1961) states:

> Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand.

And *see* Comment, *supra* note 13, at 986–87; Comment, "Public Aid to Education," *supra* note 29, at 259–62.

[36] For additional authorities discussing the legality of governmental aid to educational institutions *see* J. O'Neil, "Religion and Education under the Constitution" (1949); R. Drinan, Religion in the Courts and Public Policy (1963); L. Pfeffer, Church, State and Freedom, chs. 13 & 14 (1967); W. Rafalko, "The Federal Aid to Private School Controversy: A Look," 3 Duquesne U. L. Rev. 211 (1965); P. Kauper, "Church and State: Cooperative Separatism," 60 Mich. L. Rev. 1 (1961); W. Katz, "Freedom of Religion and State Neutrality," 20 U. Chi. L. Rev. 426 (1953); R. Cushman, "Public Support of Religious Education in American Constitutional Law," 45 Ill. L. Rev. 333 (1950); C. Fahy, "Religion, Education and the Supreme Court," 14 Law & Contemp. Prob. 73 (1949); W. Mitchell, "Religion and Federal Aid to Education," 14 Law & Contemp. Prob. 113 (1949); Comment, "Higher Education—Constitutionality of Federal Financial Aid to Church-Related Colleges," 77 Harv. L. Rev. 1353 (1964); Note, "Federal Aid to Church Affiliated Colleges and Universities: Breaching the Wall," 19 S.C. L. Rev. 231 (1967).

Some states have more restrictive wording in their state constitutions with respect to the separation of church and state principle than the Federal Constitution, and from a literal reading of the provisions of the State Constitution this would appear to be the case in Texas. Article 1, Section 7 of the Texas Constitution provides:

> No money shall be appropriated or drawn from the Treasury for the benefit of any sect or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

Moreover, Article 7, Section 5 prohibits the use or appropriation of the permanent school fund for the support of any sectarian school.

These seemingly highly restrictive provisions have received little interpretation, but certain opinions of the Attorney General of Texas handed down in the past have demonstrated little inclination toward lenient or liberal interpretation thereof. For example, two of these opinions, one rendered the year prior to the decision in *Everson v. Board of Education*, indicated that pupils of parochial schools may not be transported on public school buses.[37] Another opinion pointed out that these sections of the Texas Constitution would prevent the Department of Education from paying the tuition for students in denominational or sectarian schools.[38] The only Texas case mentioned in 1896 Supreme Court of Texas case is not on point, for it has to do with the question of withholding payments of a county's *pro rata* share of the public school fund to satisfy the County's indebtedness to the state. State aid to a religious institution was not involved. Aspects of Section 5 of Article 7 relating to the school fund were in issue, and, in this respect, the Court declared that the Legislature could not do indirectly what it could not do directly, and further that the school fund was created to support the public schools. Other cases cited in support of the Attorney General Opinions were out-of-state cases of states having constitutional provisions similar to those of Texas.[40]

It may be that this restrictive type of approach which would bar State of Texas aid to denominational colleges and universities for secular educational purposes is incorrect. An old Texas case, *Church v. Bullock*,[41] indicates by way of *dictum* that this may be true. Here the Court interpreted the meaning of the prohibition set forth in the two articles of the Texas Constitution. It defined sect as "a body of persons distinguished by particularities of faith and practice from other bodies and adhering to the same general system."[42] An educational institution which admitted persons from all creeds and faiths could, under this definition, hardly be described as a sect.

A religious society as used in Article 1, Section 7, was stated to be

> [a] voluntary association of individuals or families united for the purpose of having a common place of worship and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the various ordinances of religion.[42]

Again this does not define a modern day denominational college or university which has as its primary purpose the imparting of a secular education. Such an institution does not have as one of its purposes the providing of a common place of worship, nor does it exist to provide a teacher to instruct in religious doctrines and administer ordinances of religion. To instruct in religious doctrines would be the duty of a seminary, aid to which would be most definitely forbidden under the Texas Constitution, and which the court defined as a place for the education of men for the priesthood or ministry.

The language of Article 7, Section 5, in prohibiting appropriation from the school fund to any sectarian school, was said to have had as its purpose the forbidding of the use of public funds for the support of "any particular denomination or religious people, whether they be Christians or of other religions." This, of course, does not describe that type of church-affiliated college which provides secular education for all.

In 1966 an Attorney General's Opinion (No. C-644)[44] indicated a change of direction from the previously held strict interpretations. The question under consideration was whether the Governor's Committee on Aging would contract with church-operated or church-related institutions to conduct training classes for field workers, or for the development of programs to benefit the aging, and for other activities in this specialized field. The opinion held that such contracts with religious institutions for the performance of these services did not violate Article 1, Section 7 of

[37] Op. Atty. Gen. Tex. 1941, No. 0-4220; Op. Atty. Gen. Tex. 1946, No. 0-7128.

[38] Op. Atty. Gen. Tex. 1940, No. 0-2412.

these opinions is that of *Jernigan v. Finley*.[39] This

[39] 90 Tex. 205, 38 S.W. 24 (1896).

[40] State *ex rel.* Traub v. Brown, 172 Atl. 835 (Del. 1934); Judd v. Board of Education of Union True School District, 28 N.Y. 200, 15 N.E. 2d 576 (1938).

[41] 104 Tex. 1, 109 S.W. 115 (1908).

[42] *Id.* at 5, 109 S.W. at 117.

[43] *Id.*

[44] Atty. Gen. Op. Tex. 1966, No. C-644.

the Texas Constitution, in spite of the previous Attorney General's Opinion which had prohibited as contrary to the Texas Constitution the payment of tuition by the state of certain disabled persons to denominational colleges and universities on the ground that such payments would be an indirect benefit prohibited by the Texas Constitution. This opinion was expressly declared to be overruled, and note was made of the fact that it was based on a Texas case which was not on point and on out-of-state cases which, though well-reasoned and indicative of the law at the time when they were rendered (one had since been superseded), were still not binding in Texas but were only persuasive. Attention was also called to more recent decisions in other states which refused to adopt a view and philosophy to inhibit all aid to religious educational and other institutions, particularly the Kentucky Supreme Court case, *Kentucky Building Commission v. Effron.*[45] The 1966 Attorney General's Opinion after noting that Kentucky had constitutional provisions as to religion and aid thereto similar to those of Texas went on to say:

> It is further the opinion of this office that the rationale of *Kentucky Building Commission vs. Effron* . . . is valid as a basis for interpreting Article I, Section 7, Texas Constitution.[46]

The Kentucky case concerned an allotment of state funds for non-profit public hospitals controlled and governed by boards of certain religious faiths. The decision in upholding these appropriations first stressed that operation of non-profit privately owned hospitals for the common good would meet the public purpose requisite for taxation, and, further, that the expenditure did not trench on the provision prohibiting the making of grants of public emoluments or privileges except in consideration of public service. Grants for the construction of these hospitals did fulfil the public service or public purpose requirement. At this point the court declared:

> It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended.[47]

The court in taking up the establishment principle of the State Constitution found that the hospitals were open to all creeds as well as to those who did not profess any religious belief, that religion was not taught, that no sect was given preference over any other, and that the governing boards of the hospitals were but channels or conduits for the funds. Since the use to which the funds were put was all important, and since the use here was for a public purpose benefitting all of the people of the state, it was decided that the State Constitution was not violated simply because the hospitals were religiously affiliated. This decision concluded:

> Manifestly the framers of our Constitution did not intend to go so far as to prevent a public benefit, like a hospital in which the followers of all faiths and creeds are admitted, from receiving State aid merely because it was originally founded by a certain denomination whose members now serve on its board of trustees.[48]

The Texas Attorney General's Opinion also discussed a New Hampshire Supreme Court Opinion, *Opinion of the Justices,*[49] wherein it was determined that state grants to sectarian hospitals to aid them in the education and training of nurses were constitutional. The New Hampshire Court found that the grant aided no particular sect nor all sects, but furthered the teaching of nursing science; that an incidental benefit by some denominations was immaterial where the public funds are not used for a sectarian purpose; and that the institution was merely a conduit through which public funds were channeled for a public purpose.

This case involving aid to religious institutions for educational purposes is much clearer precedent for state aid to denominational colleges and universities than the Kentucky hospital construction case, because it can be contended that there is more separability of the public purpose when the latter type of aid is involved where the hospital does not indoctrinate patients in religion, while in the case of educational grants there is likely to be some degree of religious permeation. Nevertheless, the New Hampshire Court found public purpose rather than sectarian or private purpose and upheld the grant.

In another 1966 Opinion of the Attorney General of Texas (No. C-719) it was specifically determined that the Texas Educational Agency can constitutionally pay handicapped persons to attend denominational colleges as a vocational rehabilitation service. The opinion declared that the former opinion No. C-644 controlled and that

> [i]f a valid public purpose is being served, in this case, the retraining of handicapped persons, and the State is expending money for services rendered, the character of the private agency rendering the public service does not control the expenditure.[50]

[45] 310 Ky. 355, 220 S.W. 2d 836 (1949).
[46] Atty. Gen. Op. Tex. 1966, No. C-644 at pp. 3131–32.
[47] 220 S.W. 2d at 837.
[48] *Id.* at 838.
[49] 113 A. 2d 114 (N.H. 1955).
[50] Atty. Gen. Op. Tex. 1966, No. C-719, 3466 at 3467. But *see* Art. 16, Sec. 6 added to the Texas Constitution in 1966 which pertains to state participation in programs financed with private or federal funds for rehabilitation of blind, crippled, physically

Attention may also be directed to certain Texas constitutional provisions which prohibit the levying of taxes except to raise revenue for the administration of the state government, which limit the lending or giving the credit of the state, and which deny the grant of public money to individuals or associations of individuals.[51] These provisions would not seem to reviding for education has been recognized as a valid public or governmental purpose; therefore, benefit provided for this purpose, even though a private agency, th denominational college, might be the conduit through which the benefits flow, would not be adverse to the constitution. To reiterate the previously quoted

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or mentally handicapped persons and which as to these funds and these persons the expenditure of money to projects conducted "by local level or other private, non-sectarian associations, groups and nonprofit organizations. . . ." And *see* Atty. Gen. Tex. Op. 1967, No. M-91, interpreting this amendment in another context.

[51] Tex. Const. Art. 3, Secs. 48, 50, 51.

strict state aid to denominational educational institutions or other private institutions *per se* for they do not prohibit the levying of taxes, the use of state credit or grants for governmental or state purposes.[52] Pro-

[52] Friedmann v. American Surety Co. of N.Y., 137 Tex. 149, 151 S.W. 2d 570 (1941); City of Aransas Pass v. Keeling, 112 Tex. 339, 247 S.W. 818 (1923); Highway Commission v. Vaughn, 288 S.W. 875 (Tex. Civ. App. 1926) *error refused*; Road Dist. No. 4, Shelby County v. Allred, 123 Tex. 77, 68 S.W. 2d 164 (1934).

language of the Attorney General and the Kentucky Supreme Court, the test is not concerned with the recipient of the money "but the character of the use, for which it is expended." If that use is a public or governmental one the constitution is not transgressed.

These later opinions of the Texas Attorney General and the theories of the out-of-state cases upon which they rest, if followed by Texas courts, would go far in upholding financial aid by the State of Texas to church-related higher educational institutions for secular educational programs and facilities. Indeed the interpretation they give to the Texas constitutional principles seem to be similar to the interpretation given by the United States Supreme Court to the Federal Constitution. Since secular education is endowed with a public purpose, and since aid thereto has a primary effect that neither advances nor inhibits religion but benefits it only incidentally, it would seem that governmental grants to church-related institutions for secular educational purposes will stand as legal both under the State and Federal Constitutions.

Keeping in mind these theories and rules which have been enunciated, a closer scrutiny of the validity of certain specific types or programs of governmental aid to private colleges and universities including those connected with religious denominations becomes requisite. These programs of aid have taken two non-exclusive approaches—student support and institutional support.

STUDENT SUPPORT

Tuition grants, loans, scholarships and fellowships have been awarded to students by both the Federal Government and various state governments. Scholarships are usually given on a competitive basis, *i.e.*, to the superior student showing academic promise who is at the same time in financial need. Graduate and professional fellowships are awarded for special grant programs and the student who enrolls for research and study therein. They may carry funds for the student and the university in order to help the latter defray the cost of the program. Tuition award may be either partial or full. They are not usually given on a competitive basis but are granted to students not able to afford a college education. The report of the Liaison Committee on Texas Private Colleges and Universities sets forth the types of programs thought to be needed for Texas. They are described as (1) an undergraduate scholarship program, (2) professional fellowships, (3) graduate educational development grants or incentive awards, (4) grants to the economically and culturally deprived, and (5) continuation of the Texas loan program.[53]

A dearth of authority exists as to the constitutionality of these forms of student support for those attending denominational educational institutions.[54] An 1879 Mississippi case[55] ruled that the constitutional provision of that state which forbade control of any part of the educational funds of the state by religious sects or appropriation of state monies for the support of sectarian schools[56] would make invalid legislation authorizing the presentation of "pay certificates" from the school fund for children attending private schools. South Dakota courts have also ruled[57] that its constitutional provisions[58] forbid payment of tuition fees by the state for persons attending denominational universities or payment by a school district of money to parents who sent their children to parochial schools. More recent cases in Virginia and Vermont have taken similar views holding the use of public funds to pay tuition to sectarian schools to be unconstitutional. The Virginia decision[59] found both state and Federal constitutions violated because sectarian groups would be benefitted, inasmuch as such payments would provide pupils for religious classes through use of the state's compulsory school machinery and would compel contributions by taxpayers for the propagation of religious beliefs which they might not share.[60] The Vermont case, speaking only of the violation of the United States Constitution, found that the church and its ministry could not be separated from the educational function; therefore the payment of students' tuition to attend a denominational school would fuse secular and sectarian education.[61]

On the other hand a Wisconsin statute which provided a $30 per month payment to World War I veterans for attendance at any Wisconsin school or college with payment to the institution chosen on a basis of actual increased cost to the institution was upheld despite an attack on constitutionality because payments to religious institutions chosen by the veteran would be financial aid to such institutions.[62] The court answered:

> The contention that financial benefit accrues to religious schools from the act is equally untenable. Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. They are not enriched by the services they render. Mere reimbursement is not aid.[63]

Some writers with the Mississippi, Virginia, and Vermont cases in mind have concluded that tuition payments for attendance at church-related institutions are outside the constitutional pale.[64] Another author viewing the above Wisconsin decision would find an exception to such unconstitutionality in the case of payments to veterans attending denominational schools. He, however, indicates in a somewhat puzzled manner that there seems to be no reason for differing constitutional treatment of veterans and nonveterans in this instance.[65]

[53] Liaison Committee report, *supra* note 5 contains a summary of the various types of student support and sets forth those which should be authorized for Texas at pp. 75–76.

[54] For detailed discussion of state cases on the subject *see* C. Antieau, P. Carroll, T. Burke, Religion under the State Constitutions, ch. 2 (1965).

[55] Otken v. Lamkin, 56 Miss. 758 (1879).

[56] Miss. Const. Art. VIII Sec. 208.

[57] Synod of South Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891); Hlebanja v. Brewe, 58 S.D. 351, 236 N.W. 296 (1931).

[58] Two articles of the South Dakota Constitution are applicable. Article VI Sec. 3, appropriation or gifts of property or money for the benefit of sectarian or religious societies or institutions. Article VIII Sec. 16 prohibits appropriations or credits to sectarian schools.

[59] Almond v. Day, 197 Va. 419, 89 S.E. 2d 851 (1956).

[60] Va. Const. Art. IV Sec. 67 provided that appropriations should not be made to "any church or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. . . ."

[61] Swart v. South Burlington Town School District, 122 Vt. 177, 162 A. 2d 514 (1961).

[62] State *ex. rel.* Atwood v. Johnson, 170 Wis. 251, 176 N.W. 224 (1920).

[63] 176 N.W. at 228.

[64] *E.g.* Pfeffer, *supra* note 36, at 536.

[65] Antieau, Carroll & Burke, *supra* note 54, at 40.

The *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education* of the Department of Health, Education, and Welfare speaks of the probable validity of a program of aid to assist a small number of selected students to receive education at an institution of their choice such as an award of merit scholarship or a grant of aid to remedy a shortage of adequately trained persons to serve the nation's need.[66] Here the benefit received by the religious institution, in so far as the government would be concerned, would come about by chance and hence would be largely incidental or indirect. If, however, selective standards were not maintained and tuition awards were granted to all college students, then this would be viewed as aiding all institutions including those of a sectarian nature.[67] In such an instance the assistance to the church-related institution which would ensue would be constitutionally invalid. It was stated:

> Under such a system there would be no functional difference between the award of scholarship and direct payments to colleges on a per capita basis. A program so equivalent to directly subsidize would transcend, we believe, the constitutional prohibition.[68]

Other authorities would disagree with this view. The Legal Department of the National Catholic Welfare Conference would consider scholarships based on merit as well as tuition grants to be in the same constitutional category and either type of award for attendance at the school of the student's choice, sectarian or non-sectarian, would be valid.[69]

An interesting approach to the problem is that of Professor Wilbur G. Katz. In speaking of the G.I. Bill of Rights, a federal law providing tuition support to veterans for education in the profession in which they were to seek their livelihood—including that of the ministry—and at the schools of their choice—including church-related institutions, even divinity schools—this author states that a wall-of-separation approach would preclude the choice of denominational schools or seminaries. Nevertheless, such a choice could not be precluded for such a strict separation so as to deny choice would act to violate another constitutional provision of equal standing, *i.e.*, the free exercise of religion. He states:

> The foregoing illustrations [including that of the G.I. Bill of Rights] do not show that aid to religion, if relatively minor, is a proper legislative purpose. They are examples, rather, of a legislation which a strict rule of church-state separation would preclude, but which is permissible to avoid hampering the free exercise of religion.[70]

This reasoning could be applied to scholarship grants and tuition payments to other college and university students, so that to restrict their award to students attending non-sectarian schools only might be considered as an interference with the student's free exercise of religion.[71]

Finally, the previously mentioned Texas Attorney General's Opinion may be interjected. This would recognize the constitutionality of tuition payments for attendance at denominational schools on the ground of validity of the secular public purpose, education. the character of which is not changed or controlled by the character of the agency receiving the money even though some incidental benefit might be received by this agency—the church-related institution.[72] The latter might be said to accord with the principle of the *Everson* and *Schempp* cases.

As to the constitutionality of low interest loans for college and university students, Texas has expressly provided by recent constitutional amendment for their award to students admitted to attend any accredited institution of higher education, public or private, within the state. Since all students are included within the terms of the amendment, loans to those attending church-related institutions would be valid under the Texas Constitution.[73] The contention can be made that since the amendment to be constitutional must be in accord with the Federal instrument, a belief is shown that such loans would not be invalid under the latter.

[66] Memorandum, *supra* note 33, at 370.
[67] *Id.* at 352, 370–71.
[68] *Id.* at 371.
[69] *Id.* at 436.
[70] Katz, *supra* note 36, at 431–32.
[71] This view has been taken by the Memorandum, *supra* note 33, at 378.
[72] *Supra* notes 44, 46 and 50.
[73] Tex. Const. Art. 3, Sec. 50b.

Programs of governmental aid to educational institutions may be in the form of general support grants, grants for construction, equipment and maintenance of certain facilities, contracts for programs, projects and services as well as degree production grants, *i.e.*, aid on the basis of the number of degrees awarded annually. The Liaison Committee on Texas Private Colleges and Universities would recommend authorization of the following types of programs for state institutional support of higher education: (1) an investment in construction and equipment facilities related to special educational needs of the state, (2) a policy of financing institutions utilizing every resource including a proper proportion from the student and his parents if able to provide it, (3) a policy of contracting for programs, services and facilities wherever possible, (4) a program of grants and contracts for institutional research and experimentation, (5) an accredited private or independent institution production and service grant which would help to close the cost gap between private and public institutions, and (6) a program to assist the developing and special purpose institutions to serve better their functions, to improve their quality, and to make a more meaningful contribution to the total higher education effort in the state in terms of their unique situations.[74]

These programs of extending benefits differ from the student-support programs in that the aid for the most part is extended directly to the institution. Extending the financial benefit to the student may more nearly be brought in constitutional line with the student- or pupil-recipient test of the *Everson* case, and thus may more likely be upheld than direct aid to the institution; although, in reality, the identity of the recipient should hardly determine constitutionality. It is the assistance to religion which is constitutionally forbidden.

Nevertheless, the large majority of state cases have held appropriations of public money to assist denominational educational institutions to be unconstitutional. Some, however, have determined that such assistance can be considered as constitutional where it is payment for educational services rendered by the school which the government would otherwise have to provide.[75] An Oklahoma case[76] for example decided that a state could pay a sectarian institution for housing and educating orphans. The court declared that so long as the terms of the contract "involve the element of a substantial return to the State and do not amount to a gift, donation, or appropriation having no relevancy to the affairs of the State there is no constitutional provision offended."[77]

The Memorandum of the Department of Health, Education, and Welfare came to the conclusion that across-the-board grants and loans to church schools could not be made, for such a grant or loan not in any way earmarked for secular purposes would clearly benefit the religious function of the schools.[78] On the other hand extension of governmental benefits to church-related educational institutions for special purpose programs such as providing for specialized training, national defense research, college dormitories was thought to be constitutional. These special purpose funds were believed to be separated from the religious function and no direct connection with religion existed.[79] The report went on to emphasize with respect to higher education that differing considerations were present here and that such aid would be less constitutionally vulnerable than assistance to primary and secondary schools. It was stated:

> More important are the distinctive factors present in American higher education: the fact that the connection between religion and education is less apparent and that religious indoctrination is less pervasive in a sectarian college curriculum; the fact that free public education is not available to all college students; the desirability of maintaining the widest choice of colleges in terms of the student's educational needs in a situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination again, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the college enrollment does not have the power of State compulsion supporting it.[80]

It should be noted that the proposed programs of the Liaison Committee could fall within certain of these ideas so as to be considered constitutionally sound. Those which provide financial aid to meet special educational needs or to serve special purpose programs or institutions of a secular nature would meet the special purpose test discussed above. Programs numbers one, three, four and six would appear to fall

[74] Liaison Committee report, *supra* note 5, at 76–78, 80.
[75] The cases are discussed in Antieau, Carroll, Burke, *supra* note 54, at 24–29.
[76] Murrow Indian Orphans' Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (1946).
[77] 171 P. 2d at 603.
[78] Memorandum, *supra* note 33, at 351–52, 374–75.
[79] *Id.* at 375–77.
[80] *Id.* at 380.

within this category, while numbers three and four could also be considered as reimbursement by the state for secular services rendered, and as such would not be a grant of aid but mere remuneration. In so far as number five is a service grant, it too would come within this classification. Number two would seem to be a type of student support on the basis of need and thus could be classified under the student recipient and indirect aid test of the *Everson* case. Even though the aid was channeled through the institution to pay the student's tuition or scholarships, or even if it were in the form of a production grant like number five or a cost-of-education grant paid to the institution so as to help to meet the full cost of the student's education, his would be a supplement to scholarship or tuition payments and if the latter are constitutional the former should be valid also. The recipient of the payment itself should not be conclusive as to constitutionality.[81]

The Memorandum of the Department of Health, Education and Welfare may be drawing the constitutional line too narrowly when it speaks of direct grants to church-affiliated educational institutions and sustains their constitutionali y only with respect to special purpose grants. In view of the *Schempp* case test it would seem that grants earmarked for secular education and secular education facilities could well be considered as constitutional, for, although as noted, some incidental benefits might be considered as extended to religion, still the *primary* effect would appear neither to advance nor inhibit religion and the legislative purpose would be secular. Moreover, the Department's Memorandum itself recognized that grants and loans at the college level would be subject to differing constitutional considerations of a pragmatic and practical nature from those to primary and secondary schools, foremost among them being the fact that the higher educational purpose can hardly be served by the expansion of secular institutions only.[82]

[81] *Id.*

[82] *Id.* at 377–81.

CONCLUSION

On the Federal constitutional level it appears evident that both the Federal and State Governments may, without committing constitutional error, give some support to church-related colleges and universities either by way of incidental or indirect benefits or by subsidizing aspects of education and the educational process of a secular nature. Following recent Texas Attorney General opinions the same can be said to be true under the Texas Constitution.

However, caveats must be interposed. State court decisions are in disarray in this area. In Texas there are no meaningful state court decisions bearing upon the point and interpreting the provisions of the Texas Constitution other than the rather generalized *dictum* in the old case of *Church v. Bullock*.[83] The Supreme Court of the United States has spoken to permit some indirect aid to students attending parochial schools, but sight should not be lost of the healthy dissents appending to these decisions. Moreover, as mentioned above, no Supreme Court of the United States case has been handed down as direct precedent for governmental aid to church-related institutions of higher education. The broad *Schempp* test appears to be applicable, but this test, stressing as it does the primary end or effect of the aid, requires much judicial weighing and judgment. Such judicial weighing and judgment permit differing judicial conclusions, and can lead to decisions such as that of the *Horace Mann* case which would hold invalid direct grants for secular purposes to some church-related institutions characterized by the court as sectarian, but not to others not falling within such a characterizing of legally sectarian. The court said that it was applying the primary effect *Schempp* test. If this *Horace Mann* rule were to be accepted as the correct interpretation of the Texas Constitutional provisions or even as the proper interpretation of the Federal Constitution, those church-related institutions maintaining close ties with a certain religious sect so that religious influence permeates (as evidenced by compulsory chapel attendance or compulsory courses on religion or as evidenced by a personnel largely made up of members of the denomination and where the institution is closely controlled by members of the denomination) would find themselves denied direct governmental assistance even for their secular educational purposes.

[83] Notes 41 and 42 *supra*.